Supreme Court, U.S.
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No. 10-236

IN THE
SUPREME COURT OF THE UNITED STATES

GREGG C. REVELL,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND
NEW JERSEY; SCOTT ERICKSON

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Notwithstanding Respondents' Brief in Opposition, the Petition should be granted. In addition to mischaracterizing portions of the record, Respondent's Brief in Opposition argues legal conclusions based on unwarranted speculation as to facts not in evidence, and disregards the legal standard entitling Revell to every favorable inference on a motion to dismiss. Morever, Respondents' argument ignores the sweeping impact of the court of appeals' decision on overnight travelers using all modalities of transportation, the effective nullification within the Third Circuit of the key protections Congress intended in 18 U.S.C. § 926A, and the creation of confusion as to the meaning of "readily accessible." The Petition should be granted so that these matters can be addressed by the Court.

The Petition should also be granted to resolve whether a government agency which seizes property must, under the Due Process Clause, initiate a forfeiture proceeding to retain the property once the property is not needed as evidence.

I.
REVELL'S FIREARM WAS NOT "READILY ACCESSIBLE" WITHIN THE MEANING OF 18 U.S.C. § 926A

1. Respondents mischaracterize the allegations of the complaint when they state:

> It is undisputed that Revell alleged in the complaint that at Newark Liberty

> International Airport ("Newark"), he took possession of the two locked containers carrying his firearm and ammunition and transported them to a hotel at the airport where he spent the night (App. 17a). Revell further alleged that he returned to the airport the next day with the locked containers and that after his luggage passed through the TSA's x-ray screening, he gave the key to both containers to the TSA agent who opened the cases (App. 17a).

Brief In Opposition 6-7.

As the court of appeals stated at the cited page of its opinion:

> He alleged that, "[a]fter retrieving his bag, because there were no more connections to Allentown until 9:45 a.m. the following morning ..., [he] went directly to, and stayed the night at, the Airport Sheraton Hotel." (App. at 23.) He further alleged that he returned with his luggage directly to the airport the next day and that a TSA agent, after x-raying the luggage, opened it with a key that Revell gave him.

App. 17a.

Accordingly, it was not "undisputed' that Revell "took possession of the two locked containers"; what

was undisputed was that he took possession of his *luggage* (in which were the two locked containers) and took his luggage to the hotel. Because the locked containers were in his luggage, the firearm and ammunition were not "readily accessible" within the meaning of 18 U.S.C. § 926A because he could not quickly reach inside the locked containers and withdraw the firearm for immediate use.

2. Respondents incorrectly assert that "[t]here is nothing on the record here that supports petitioner's assertion that he could lawfully possess his firearm in the State of Pennsylvania." Brief In Opposition 6, n.1. On the contrary, the record showed that Revell had a Utah permit to carry a firearm. App. 29a, 52a. Because he had a Utah permit, Revell could lawfully carry a firearm in Pennsylvania as a matter of law.

18 Pa. C.S.A. § 6106(a) provides in pertinent part:

> [A]ny person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under the chapter commits a felony of the third degree.

18 Pa. C.S.A. § 6106(b) provides in pertinent part:

> (b) Exceptions. - The provisions of subsection (a) shall not apply to:

* * *

11) Any person while carrying a firearm in any vehicle, which person possesses a valid and lawfully issued license for that firearm which has been issued under the laws of the United States or any other state.

* * *

15) Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:

> (i) The state provides a reciprocal privilege for individuals licensed to carry firearms under section 6109.
>
> (ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth.

The Attorney General of Pennsylvania has determined that Utah has granted reciprocity to Pennsylvania license holders. See www.attorneygeneral.gov/crime.aspx?id=184. Thus, the record shows that Revll could lawfully carry a firearm in Pennsylvania.

3. The gravamen of Respondent's argument concerning whether Revell was in compliance with 18 U.S.C. § 926A is capsulized in the following statement:

> Once Revell was in the hotel room with his luggage, it defies reason to argue that he did not have ready access to the firearm and ammunition as he had the key to open the containers (App. 17a). . . . [S]ince he was spending the night at the hotel . . . it stands to reason that he opened his luggage to change his clothes.

Brief In Opposition 7-8.

The dismissal of Revell's claim under 18 U.S.C. § 926A was for failure to state a claim pursuant to Rule 12(b)(6). App. 17a, n.13. Accordingly, a court must "accept as true all of the factual allegations contained in the complaint." *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 508, n.1 (2002). Further, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

Respondents' above statement is nothing more than blatant speculation which is not supported by the

express allegations of the complaint nor by a construction of those allegations favorable to the pleader. Indeed, to the contrary, Respondents essentially contend that the complaint must be construed as *unfavorably as possible* to Revell.

The only allegation concerning Revell's stay at the hotel was that Revell "stayed the night at, the Airport Sheraton Hotel." This allegation says nothing whatever concerning the location of the firearm while Revell was at the hotel, or what, if anything, Revell did with the firearm while he was in the hotel. Accordingly, the court of appeals could not have concluded that the firearm was "readily accessible" to Revell.

4. Respondents assert that the firearm and ammunition were "readily accessible":

> *if* Revell had the key and the locked containers with him at the hotel so that within seconds he could open the containers and load the firearm.

Brief In Opposition 8 (emphasis added).

Respondents thus acknowledge that the complaint does not allege the location of the firearm and ammunition while Revell was at the hotel. Accordingly, Respondents effectively acknowledge that the court of appeals could not have determined whether the firearm and ammunition were "readily accessible" while Revell was at the hotel. What Respondents are doing is arguing that, in a

hypothetical fact pattern -- *i.e.*, Revell had the key and the locked containers with him at the hotel, that the locked containers were accessible to him, and that the locks could be opened readily — the firearm and ammunition were "readily accessible." Whether or not these facts would support the conclusion that the firearm and ammunition were "readily accessible" to Revell, these facts are not alleged in the complaint, and a construction of the allegations of the complaint which is favorable to the pleader does not justify such facts.

In any event, to resolve the meaning of the term "readily accessible" as used in 18 U.S.C. § 926A, with respect to a stranded airline traveler whose luggage contains an unloaded firearm and ammunition in locked hard cases — and indeed with respect to all overnight travelers who must stay at a hotel during a continuous journey — this Court should grant the Petition.

5. Respondents argue that Revell's "reliance on *Thornton v. United States*, 541 U.S. 615 (2004) is misplaced" because that case involved an automobile search. Brief In Opposition 8. Respondents do not articulate the reason they believe that, because *Thornton* involved an automobile search, it is not helpful in understanding the meaning of the term "readily accessible." On the contrary, since 18 U.S.C. § 926A expressly includes transportation of firearms in automobiles, *Thornton* sheds light on the meaning of the term "readily accessible" as used in 18 U.S.C. § 926A. Notably, Respondents have offered no construction of the term "readily accessible" as used in

18 U.S.C. § 926A which contradicts *Thornton*'s reasoning.

6. Respondents argue that *State v. Williams*, 636 P.2d 1092 (Utah 1981), is "inapposite" because it involved the construction of a state statute prohibiting the carrying of a concealed weapon in an automobile. Brief In Opposition 8. Again, because 18 U.S.C. § 926A expressly includes transportation of firearms in automobiles, *Williams* is helpful in understanding the meaning of the term "readily accessible" as used in 18 U.S.C. § 926A. Moreover, Respondents have again offered no construction of the term "readily accessible" as used in 18 U.S.C. § 926A which contradicts *Williams'* reasoning.

7. In response to Revell's rejection of the court of appeals' suggestion that a person in Revell's situation "go[] to law enforcement representatives" and "request[] that his firearm and ammunition be held for him overnight" (598 F.3d at 137-138), Respondents argue that Revell's concern with waiver of Fifth Amendment rights is:

> unfounded since air travelers with firearms in their check-in luggage are required under Transportation Security Administration ("TSA") regulation in any event to declare it with the airline personnel pursuant to 49 C.F.R. 1540.111(C)(2).

Brief In Opposition 9.

The fact that air travelers are required to declare firearms in their checked luggage to *airline personnel* does not mitigate Fifth Amendment concerns with informing *state and local law enforcement officers* that a person has a firearm because declaring a firearm to airline personnel carries no risk of criminal prosecution (indeed, it is the fact of *not* so informing airline personnel that carries the risk of criminal prosecution), whereas informing state and local law enforcement officers in states like New Jersey that a person has a firearm will almost certainly, as Revell discovered, result in arrest and prosecution.

Respondents further argue that Revell "misreads" N.J. Stat. Ann. § 2C:39-12 (Brief In Opposition 10), but does not explain why. Respondents cannot provide such an explanation because there is none; § 2C:39-12 (which provides for the voluntary surrender of firearms) provides no mechanism for return of surrendered firearms. Similarly, Respondents assert that § 2C:58-3 does not prevent the return of firearms to a person in Revell's situation who temporarily surrendered them because § 2C:58-3 "addresses the purchase of firearms in New Jersey not the surrendering temporary custody." Brief In Opposition 10. The plain language of § 2C:58-3 belies that contention; § 2C:58-3 prohibits not only the sale of handguns, but broadly prohibits giving, transferring, assigning or otherwise disposing of a handgun.

9. Respondents assert that Revell contends that the court of appeals' decision "infringes on Revell's

Second Amendment rights" and that Revell is now precluded from raising this issue. Brief In Opposition 11. Revell does not now argue that the court of appeals' decision "infringes on" his Second Amendment rights. The Second Amendment was discussed in Revell's petition only for the purpose of showing that Congress exercised its power to deter violation of the right to keep and bear arms by the states through the enactment of 18 U.S.C. § 926A. Because the court of appeals has effectively rendered that exercise of power a nullity by applying the "readily accessible" exception in 18 U.S.C. § 926A where the facts before the court clearly did not justify application of the exception, this Court should grant Revell's petition to remedy the nullification of 18 U.S.C. § 926A.

II.
THE RETENTION OF REVELL'S PROPERTY WITHOUT NOTICE AND OPPORTUNITY FOR A HEARING VIOLATED THE DUE PROCESS CLAUSE

1. Respondents state that Revell "failed to show":

> 1) that there was an established procedure to retain property under these circumstances; and 2) that the post-deprivation remedy was inadequate.

Brief In Opposition 14-15.

In fact, the First Amended Complaint alleged to the contrary, *i.e.*, that "Defendants Port Authority of

New York and New Jersey and Scott Erickson deprived Revell of property without due process of law *pursuant to the established policy of Defendant Port Authority of New York and New Jersey.*" First Amended Complaint ¶ 39 (emphasis added).

In response to this plain and explicit allegation, Respondents argue that reliance on this allegation "is misplaced." Brief In Opposition 15. Respondents do not, however, even hint at why reliance on an undisputed allegation in the complaint is misplaced.[1] In fact, reliance on the allegation is *required* because Respondents' motion in the district court relied *solely* on the allegations in the First Amended Complaint in arguing that the First Amended Complaint did not state a cause of action.[2]

Respondents further argue that, "[o]n summary judgment, Revell was required to identify a Port Authority policy or procedure that effectively prevented him from recovering his property, which he failed to do." Brief In Opposition 15. Revell did so. He alleged, and Respondents did not dispute, that Respondents deprived Revell of his property without due process of law by:

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[1] Indeed, it is disingenuous of Respondents to argue that Revell's reliance on the First Amended Complaint is misplaced when that is what Respondents relied on in their motion in the district court.

[2] Respondents argued that Revell has not been deprived of his property without due process because New Jersey had adequate post-deprivation remedies.

> retaining the firearm, holster, locks, hard case containers, and ammunition seized from him in that they did not provide him notice of the basis for the retention of the property and of an opportunity for a post-deprivation hearing.

First Amended Complaint ¶ 38.

Further, Revell alleged, and Respondents did not dispute, that such deprivation was "pursuant to the established policy of Defendant Port Authority of New York and New Jersey." First Amended Complaint ¶ 39.

Revell showed that the post-deprivation remedy was inadequate as he showed that the deprivation was a result of a government agency policy and not a random unauthorized deprivation of property.

2. Respondents argue that "Revell was unable to show that the process provided by the state for recovering his property was not constitutionally adequate." Brief In Opposition 15. The "process provided by the state" is either a motion in the criminal action for return of property or a separate action for a writ of replevin. Neither is constitutionally adequate because neither procedure requires the state to provide:

> notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and

> afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

3. Respondents cite *State* v. *One 1986 Subaru*, 576 A.2d 859 (N.J. 1990) for the proposition that, "since the owner of a property seized as evidence in a criminal proceeding can file a replevin or move to retrieve the property, his inaction weighs against a claim that his due process rights were violated." Brief In Opposition 15. This statement is taken very much out of context. The context in which this statement was made was whether the initiation of a forfeiture proceeding was unconstitutionally delayed in light of *United States* v. *$8,850*, 461 U.S. 555 (1983), which discussed four factors to be weighed in determining whether delay in the initiation of a forfeiture action violates due-process rights: (1) the length of the delay; (2) the reasons for the delay; (3) whether the claimant has asserted his right to a hearing; and (4) whether the claimant has been prejudiced by the delay. In discussing the third factor, *One 1986 Subaru* stated:

> Claimants can file replevin actions to seek the return of seized property. . . . Similarly, if the seizure itself was improper, the seized property can be retrieved under the Rules of Criminal Procedure. . . . Because of the availability of procedures to recover seized property, a claimant's inaction *may* weigh against a claim that his or

> her due-process rights have been violated.

576 A.2d at 867 (emphasis added).

Thus, *One 1986 Subaru* was not determining whether New Jersey's procedures were constitutionally adequate — indeed, that could not have been an issue because it was a forfeiture action that was being litigated — but rather, in determining whether the action had been timely filed, *One 1986 Subaru* considered as one factor whether the claimant had taken any action to obtain return of his property.

It is ironic that Respondents cite to *One 1986 Subaru*, and thus to *United States* v. *$8,850*, because *United States* v. *$8,850* emphasizes the due process violation here. If a delay can be a violation of due process, then certainly a complete failure to initiate forfeiture is a violation of due process.

4. Respondents assert that Revell was not entitled to "any special notice of these legal remedies. See *West Covina v. Perkins,* 525 U.S. 234 (1999)." Brief In Opposition 15. Revell does not dispute that Respondents were not required to provide him with "notice of state-law remedies" (525 U.S. at 240) as he argues that it was the duty of Respondents, because they retained his property, to initiate a forfeiture proceeding, which included notice reasonably calculated to apprise him of the pendency of the action and to afford him an opportunity to present his objections, or to return the property.

5. Respondent states that "Revell ultimately recovered his property through the simple means of requesting its release from Essex County." Brief In Opposition 16. This is simply untrue. It was not until Revell filed this action (on January 27, 2006) seeking, *inter alia*, an order enjoining the Port Authority to return the property that it was returned (on July 24, 2008) — two and a half years after this action was filed and almost three years after the charges against Revell were dismissed (on August 2, 2005).

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

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